UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 27

Docket No. CB-7121-13-0012-V-1

Benoit Brookens,

Appellant,

v.

Department of Labor,

Agency.

April 11, 2014

Eleanor J. Lauderdale, Esquire, Washington, D.C., for the appellant.

Rolando Valdez, Esquire, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant seeks review of an arbitration award that sustained his removal. For the reasons set forth below, we GRANT the request for review under 5 U.S.C. § 7121(d) and FORWARD the matter to the Washington Regional Office for further adjudication of the appellant's allegations of discrimination and reprisal.

BACKGROUND

¶2 The agency removed the appellant from the GS-12 position of International Economist, effective November 19, 2008, based on unacceptable performance in

two critical elements of his performance standards, Research and Policy, and Representation. Request for Review (RFR) File, Tab 25, Subtab 6. On behalf of the appellant, the union challenged the removal action pursuant to the negotiated grievance procedure through arbitration. RFR File, Tabs 10, 29. The arbitrator issued two decisions on grievances filed by the union. He characterized the first, issued on September 22, 2009 (2009 Award), as a decision on a preliminary issue. In it he found that the removal action was performance based, taken under chapter 43 of the Civil Service Reform Act (CSRA), and not an adverse action under chapter 75 of the CSRA. RFR File, Tab 10. He denied the grievance. *Id*. In the second, issued on November 20, 2012 (2012 Award), he found that the appellant's removal for unsatisfactory performance was fully supported by the evidence. RFR, Tab 29. He found that the agency established that the appellant was unable to perform the tasks required of an International Economist. *Id*. He also found that the appellant failed to show retaliation for his union activities or discrimination on the bases of age and race. *Id*. Accordingly, he dismissed the grievance. *Id*.

¶3 The appellant filed a request for review of the arbitrator's decisions. RFR File, Tabs 7, 10. The appellant argues that the arbitrator erred in finding that the removal action was taken under chapter 43. RFR File, Tab 7 at 2. The appellant also asserts that he had a new supervisor beginning in November 2007 who was without the expertise to evaluate his performance, predetermined without any observation that his performance was unacceptable, and imposed standards without affording him a meaningful opportunity to improve. *Id*. at 10-13, 26-30. The appellant further argued that the arbitrator failed to consider the union's argument that the agency committed procedural error by failing to give the appellant a mid-year evaluation prior to placing him on a performance improvement plan (PIP). *Id*. at 13-16. Additionally, the appellant asserts that the arbitrator failed to provide a legal or factual analysis to support his findings that: the agency did not subject the appellant to retaliation for his union activities,

which included representing coworkers and filing a successful grievance of his removal in 1999; and the agency did not discriminate against him because of his age and race. *Id*. at 16-26.

ANALYSIS

¶4 The Board has jurisdiction to review an arbitrator's decision under 5 U.S.C. § 7121(d) when the subject matter of the grievance is one over which the Board has jurisdiction, the appellant alleged in his grievance that the agency discriminated against him in violation of 5 U.S.C. § 2302(b)(1) in connection with the underlying action, and a final decision has been issued. *See* 5 C.F.R. § 1201.155(a)(1), (c); *see also Jones v. Department of Energy*, 120 M.S.P.R. 480, ¶ 12 (2013); *Hollingsworth v. Department of Commerce*, 115 M.S.P.R. 636, ¶ 6 (2011). Each of these conditions has been satisfied in this case regarding the 2012 Award. The appellant's removal for unsatisfactory performance is within the Board's jurisdiction. 5 U.S.C. § 4303(e); *De Bow v. Department of the Air Force*, 97 M.S.P.R. 5, ¶ 4 (2004). In his grievance, the appellant claimed that he was subjected to age and race discrimination based on a disparity in treatment. *See* RFR File, Tab 29; *see also* 5 U.S.C. § 2302(b)(1)(A); *Bennett v. National Gallery of Art*, 79 M.S.P.R. 285, 294–95 (1998). The arbitrator issued a November 20, 2012 final decision on the appellant's grievance. RFR File, Tab 29. Thus, we find that the Board has jurisdiction to review the 2012 Award under 5 U.S.C. §§ 7512, 7513(d), and 7701. *See Hollingsworth*, 115 M.S.P.R. 636, ¶ 6.

¶5 It appears that each of these conditions has not been met, however, concerning the 2009 Award. The 2009 Award appears to be a separate decision, despite the characterization of the arbitrator that the 2009 Award involved a preliminary matter. The case number assigned to the 2009 Award is different from those assigned to the 2012 Award. *See* RFR File, Tab 8. The 2009 Award decides grievance L-12-ARB-08-34. *Id*. The 2012 Award decides grievances

L-12-ARB-08-34, L-12-ARB-08-49, L-12-ARB-08-63, and L-12-ARB-08-64. *Id*. Only one case number appears in both Awards, L-12-ARB-08-34. *Id*. Nonetheless, in both Awards the arbitrator identified the issue being decided in the 2009 Award as the decision on the agency's proposed removal. *Id*. Thus, the subject matter of the 2009 Award is one over which the Board has jurisdiction, specifically, a removal action, and a final decision has been issued. The jurisdictional issue regarding the 2009 Award is whether the appellant alleged in his grievance that the agency discriminated against him in violation of 5 U.S.C. § 2302(b)(1) in connection with the underlying action.

¶6 Under regulations effective November 13, 2012, an appellant can establish the Board's jurisdiction over a request for review of an arbitration decision only if the appellant either raised a claim of discrimination under 5 U.S.C. § 2302(b)(1) with the arbitrator in connection with the underlying action, or raises a claim of discrimination in connection with the underlying action under 5 U.S.C. § 2302(b)(1) for the first time with the Board if such allegations could not be raised in the negotiated grievance procedure. 5 C.F.R. § 1201.155(c); *see Jones*, 120 M.S.P.R. 480, ¶ 12. Here, there is no assertion that an allegation of discrimination could not be raised in the negotiated grievance procedure. Further, the appellant raised no allegation of discrimination regarding the fact that the removal was taken under chapter 43 rather than chapter 75. RFR File, Tab 10. Because the appellant could have raised his claims of discrimination in the grievance proceeding that resulted in the 2009 Award, but did not, he cannot do so now for the first time with the Board. 5 C.F.R. § 1201.155(c). Thus, to the extent that the 2009 Award is a separate decision in which the appellant failed to raise an allegation of discrimination, the request for review of that decision must be dismissed for lack of jurisdiction. *See Jones*, 120 M.S.P.R. 480, ¶ 12.

¶7 Nonetheless, we have considered the appellant's assertion that the arbitrator erred in finding that the removal action was taken under chapter 43. However, we have reviewed that argument only as to the findings in the 2012

Award. As explained below, we defer to the arbitrator's finding that the agency brought the action under chapter 43.

¶8 The standard of the Board's review of an arbitrator's award is limited; such awards are entitled to a greater degree of deference than initial decisions issued by the Board's administrative judges. *Vena v. Department of Labor*, 111 M.S.P.R. 165, ¶ 5 (2009). The Board will modify or set aside such an award only when the arbitrator has erred as a matter of law in interpreting a civil service law, rule, or regulation. *Id.* Even if the Board disagrees with an arbitrator's decision, absent legal error, the Board cannot substitute its conclusions for those of the arbitrator. *Id.* Thus, the arbitrator's factual determinations are entitled to deference unless the arbitrator erred in his legal analysis, for example, by misallocating the burdens of proof or employing the wrong analytical framework. *Hollingsworth*, 115 M.S.P.R. 636, ¶ 7.

¶9 To sustain an action for unacceptable performance under chapter 43, the agency must demonstrate by substantial evidence that: 1) the removal was effected under a performance appraisal system approved by the Office of Personnel Management; 2) the performance standards are valid; 3) the employee was provided with a reasonable opportunity to demonstrate acceptable performance; and 4) the employee's performance was unacceptable in at least one critical element. *See* 5 U.S.C. §§ 4302(b), 4303(a), 7701(c)(1)(A); *Diprizio v. Department of Transportation*, 88 M.S.P.R. 73, ¶ 7 (2001).

¶10 Of these elements, the appellant's request for review appears to challenge the arbitrator's determination that the performance standards are valid and that the agency gave him a reasonable opportunity to improve his performance. RFR File, Tab 7. We construe the appellant's assertion that he had an inexperienced supervisor who imposed standards without observing the appellant's performance as an allegation that the performance standards were invalid. The appellant's assertion that he was not afforded a meaningful opportunity to improve appears consistently throughout his request for review.

¶11 The arbitrator made findings regarding the allegations that the standards were invalid and that the agency failed to give the appellant an opportunity to improve. He noted the supervisor's background as a Senior Economist at the Government Accountability Office before he came to the agency, RFR, Tab 29 at 4, and found the appellant's supervisor testified "most credibly and compellingly" that he observed the appellant's deficiencies soon after he arrived at the agency, RFR, Tab 29 at 35. The arbitrator found that the appellant's supervisor established a set of objective performance criteria for the appellant to meet and that the appellant was not improperly subjected to more exacting standards. Further, the arbitrator found that the appellant's supervisor went to great lengths to explain to the appellant how he needed to improve to meet the required level of job performance. *Id*. at 37. Thus, the arbitrator found that the appellant's standards were valid. The arbitrator also found that, after the appellant failed to perform at an acceptable level under the valid standards, the agency properly placed him on a PIP. The PIP period originally was 90 days. At the end of the 90-day period, however, the appellant's supervisor extended the PIP period by 30 days. Therefore, the appellant was provided a total PIP period of 120 days to improve his performance to an acceptable level. RFR, Tab 29. The arbitrator found that the appellant's supervisor provided the appellant with every opportunity to improve his performance during the PIP period. *Id*. at 37. The arbitrator found, moreover, based on the credible testimony of the appellant's supervisor, that despite being afforded the 120-day PIP period, the appellant failed to successfully perform the work assigned to him in the critical elements of Research and Policy, and Representation. *Id*.

¶12 Given the agency's reliance on the elements of chapter 43 to effect the appellant's removal, the appellant's assertion that the arbitrator erred as a matter

of law in finding that the removal was effected under chapter 43 is unavailing.[*] Additionally, the Board finds that the arbitrator's findings, that the appellant's supervisor observed the appellant's deficiencies and gave him an opportunity to improve under valid performance standards, are entitled to deference. There is no showing that these findings constituted errors of law.

¶13 The Board applies the same deferential review standard on the merits of an arbitrator's finding as it does in cases of an arbitrator's interpretation of a collective bargaining agreement (CBA) provision involving a purely procedural issue. *See Hackerman v. Social Security Administration*, 72 M.S.P.R. 23, 26 (1996) (deferring to an arbitrator's interpretation of a CBA provision involving the forum in which the appellant first elected to appeal his demotion); *Sweeney v. Department of the Army*, 69 M.S.P.R. 392, 394 (1996) (deferring to an arbitrator's interpretation of a CBA provision involving the timeliness of the grievance). An arbitrator is uniquely qualified to interpret a CBA, which is the source of the arbitrator's authority. *See Fanelli v. Department of Agriculture*, 109 M.S.P.R. 115, ¶¶ 10-12 (2008).

¶14 The appellant contends that the arbitrator made no finding as to his assertion that the agency violated a procedural provision of the CBA by providing the appellant with a mid-year evaluation 1 day after the commencement of the PIP. The appellant's assertion is that this alleged procedural error denied him an opportunity to improve prior to being placed on the PIP. *See* RFR File, Tab 7 at 13-16. The arbitrator identified the appellant's assertion regarding the mid-year review. He states that the appellant argued that he "was never provided

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[*] The 2009 Award was issued on September 22, 2009. RFR File, Tab 10. To be timely, a request for review of that Award had to have been filed by October 27, 2009. The request for review was filed on December 21, 2012. RFR File, Tab 1. Because we are dismissing the request for review regarding the 2009 Award for lack of jurisdiction, we find it unnecessary to address the timeliness of the appellant's request for review. *See Taylor v. Department of the Army*, 107 M.S.P.R. 638, ¶ 1 (2008).

with a mid-year appraisal but was instead presented with a PIP at the very same time that the mid-year evaluation should have taken place." RFR File, Tab 29 at 25. Further, the arbitrator identified the essence of the appellant's assertion that the agency violated a procedure provided in the CBA by acknowledging that the appellant "argued that he had not been notified of his alleged work deficiencies, nor was he given counseling as to how to improve his work" and that the appellant asserted that it was "imperative that he be put on notice of what was expected of him before being placed on a [PIP]." *Id.* at 21. However, the arbitrator found that the appellant's supervisor complied with the provisions of the CBA when he placed the appellant on the PIP. *Id.* at 36. This finding is tantamount to a finding that the agency did not violate the CBA by giving the appellant a mid-year review 1 day after placing him on the PIP. *Id.* Upon review of the record before the Board, we discern no basis for disturbing the arbitrator's interpretation of the CBA. The appellant has provided no basis for disregarding the deference due to the arbitrator's interpretation of the CBA applicable in this case. *See Fanelli*, 109 M.S.P.R. 115, ¶¶ 10-12.

¶15 As stated above, the Board can only defer to the arbitrator's findings and conclusions if the arbitrator makes specific findings on the issues in question. *Hollingsworth*, 115 M.S.P.R. 636, ¶ 8. As the appellant asserts, the arbitrator failed to provide a legal or factual analysis to support his findings that the agency did not retaliate against the appellant for his union activities and did not discriminate against him because of his age and race. The Board may make its own findings when the arbitrator failed to cite any legal standard or employ any analytical framework for his evaluation of the evidence. *Id.* Here, the arbitrator did not set forth any analytical framework for his determinations on the appellant's claims of discrimination or retaliation for union activity. Accordingly, the Board has no basis upon which to defer to the arbitrator. Therefore, we are vacating the arbitration decision as to the findings of no discrimination and no retaliation. Pursuant to the Board's authority in 5 C.F.R.

§ 1201.155(e), we forward the matter to the Board's Washington Regional Office for assignment to an administrative judge to make recommended findings on the appellant's discrimination and retaliation claims under the appropriate legal standards. *See Sadiq v. Department of Veterans Affairs*, 119 M.S.P.R. 450, 456 (2013).

¶16 An appellant is typically entitled to notice of the applicable burdens and elements of proof and an opportunity to submit evidence and argument under the proper standard. *See Wynn v. U.S. Postal Service*, 115 M.S.P.R. 146, ¶¶ 10, 13-14 (2010). To the extent that, during the arbitration process, the appellant was not afforded proper notice of his burdens and elements of proof regarding any of his affirmative defenses that were not addressed by the arbitrator under an appropriate legal standard, the administrative judge shall provide such notice and afford the parties the opportunity to submit evidence and argument under the proper standards before making recommended findings on the merits of those claims. *See Pace v. Department of the Treasury*, 118 M.S.P.R. 542, ¶ 11 (2012).

ORDER

¶17 For the reasons set forth above, we FORWARD this case to the Washington Regional Office for further adjudication. The administrative judge shall conduct such further proceedings as necessary and make recommended findings to the Board regarding the affirmative defense of discrimination and the retaliation claim consistent with this Opinion and Order. After the administrative judge issues the recommendation, the case will be forwarded back to the Board. The parties may file exceptions to the administrative judge's recommendation with the Clerk of the Board within 20 days of the date of the recommendation. The parties

may respond to any submission by the other party within 15 days of the date of such submission. The Board will subsequently issue a final decision on the merits of the appellant's request for review.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.